

IN ARBITRATION PROCEEDINGS PURSUANT TO THE CURRENT COLLECTIVE
BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of Arbitration)	
)	
between)	
)	OPINION AND DECISION
EAST BAY MUNICIPAL UTILITY)	
DISTRICT)	OF
)	
and)	PAUL D. STAUDOHAR
)	Arbitrator
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL)	California State Mediation and
EMPLOYEES, LOCAL 444)	Conciliation Service
)	Case No. 99-1-067
Grievance of ROBBIN CHATFIELD)	
_____)	

APPEARANCES:

FOR THE UNION

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FOR THE DISTRICT

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This is an arbitration to determine whether the grievance was timely filed and whether the Grievant, Robbin Chatfield, should have been promoted. The Parties to this arbitration are EAST BAY MUNICIPAL UTILITY DISTRICT (hereinafter called "District") and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 444 (hereinafter called "Union").

The Arbitrator was appointed by letter of November 22, 1999, from the California State Mediation and Conciliation Service. A hearing was conducted on February 8, 2000, at the offices of the District, 375 Eleventh Street, Oakland, California. A transcript of the hearing was made by a Certified Shorthand Reporter. Testimony was received under oath from five Union witnesses and two District witnesses, who were submitted to full examination and cross examination by Counsel. Seven joint exhibits, 27 Union exhibits, and 18 District exhibits were introduced into the record. Post-hearing briefs were filed by March 22, 2000.

Case Background

Robbin Chatfield (hereinafter called "Grievant") was hired by the District on May 5, 1985, as an Automotive Maintenance Worker III. He had applied for a journeyman mechanic position and was qualified for this job, but there were no journeyman openings at the time. During the course of his employment the Grievant, who was active as a Union steward, applied several times for promotion to the journeyman position. This arbitration concerns a denial of promotion to the journeyman

position of Automotive Mechanic B.

Under Civil Service Rules and District practice there are five steps involved in reviewing candidates for the Automotive Mechanic B position. *First*, pursuant to announcement of the position to potential candidates inside and outside the organization, applications are received by the District's Exam Unit. *Second*, a written examination is prepared, administered, and scored by the Exam Unit for candidates who qualify for consideration. The *third* step in the evaluation process is a five-part performance test. Overall supervision of the performance test was handled in this case by Peter Rattinger, Senior Human Resources Analyst for the District. Three of the five parts of this test (ignition, electronic troubleshooting, and welding) were carried out by Fleet Management personnel. In the *fourth* step, the Exam Unit prepares a Certification Record, showing the applicants' scores on the written and performance tests. This information is sent to Fleet Management, which next performs the *fifth* step of conducting an oral interview. The final decision on promotion was made by supervisor Chuck Evans from Fleet Management.

The Grievant's score on the written examination was 79, sixth best among the applicants. Two of the applicants with higher scores were Zeb Steinberg (who scored highest) at 88 and Victor Zarich at 81. The Grievant's score on the performance test was 74.8, but this was exceeded by three other applicants, including Steinberg and Zarich. When the results of the written and performance tests were combined the Grievant was tied for fourth place, with Zarich the leader, followed by Steinberg.

Zarich, Steinberg, and the Grievant advanced to the oral interview stage. This interview was conducted by Chuck Evans (the Grievant's supervisor), Senior Mechanic Paul Gutierrez (a member of the Union), and Mike Arnerich (an equipment supervisor for the City of Livermore). The interviewers maintained separate scoring sheets. Each rated the candidates in the same order on the oral exam: (1) Zarich (52 points total), (2) Steinberg (45 points total), and (3) the Grievant (34 points total).

On March 22, 1999, Mr. Zarich, who was the top candidate on the Certification Record and high scorer on the oral interview, was hired for the position of Automotive Mechanic B. He was an outside candidate, not previously employed by the District. At his prior job Zarich was a shop steward for Local 1546, Bay Area Mechanics Union.

On March 10, 1999, Supervisor Evans orally informed the Grievant that he was not selected for the Automotive Mechanic B position. Evans discussed the various test scores with him, including those of Zarich. The Grievant indicated that he intended to file a grievance. This grievance was filed on April 12, 1999.

Provisions of the Collective Bargaining Agreement

The following provisions of the Parties' negotiated agreement are especially relevant:

Article 3. DISTRICT RIGHTS

3.1. Definition of Rights.

3.1.1. The rights of the District include, but are

not limited to, the exclusive right to determine the missions of its constituent departments and divisions; set standards of services; determine the procedures and standards of selection for employment and promotion; direct and assign its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of District operations; determine the methods, means and personnel by which District operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work; provided, however, that the exercise of such District rights shall not conflict with the express provisions of this Memorandum.

- 3.1.2. District and Union mutually intend and agree that District may unilaterally exercise any and all rights reserved by this Article without further meeting and conferring with the Union. It is further mutually agreed that Union and District have met and conferred on all matters reserved to District by this Article and Union does expressly waive any and all rights to further meet and confer on such issues, or any of them, during the period of this Memorandum. Any dispute concerning the interpretation or application of District's rights shall be deemed a grievance and must be processed under Article 22.
- 3.1.3. The District agrees to apply the rights reserved by this Article in a prudent and reasonable manner; furthermore, the Dis-

trict shall consider the impact that the application of these rights may have on the work force, before applying these rights. The District agrees to make reasonable efforts to mitigate any significant impacts arising out of the application of any and all rights reserved by this Article.

Article 4. NO DISCRIMINATION/HARASSMENT

4.1. No Discrimination

4.1.1. There shall be no discrimination of any kind by the Union or the District against any employee, to the extent the applicable law prohibits such discrimination, harassment, or disparate treatment, because of race, religion, color, creed, age, marital status, national origin, sex, sexual orientation, political affiliation, physical or mental disability.

4.1.2. To the extent applicable law prohibits, there shall be no discrimination or harassment because of lawful Union activity, Union membership, or non-membership.

4.2. Harassment, Disparate Treatment and Inappropriate Behavior

4.2.1. In addition to behavior violative of Section 4.1 above, the following will not be permitted, tolerated, or condoned:

...

- (e) Inequitable treatment regarding the application of District policies, District rules, this Contract,

or those listed in 4.1 above.

...

Article 22. GRIEVANCE PROCEDURE

22.1. Intent. The District and the Union recognize the necessity for speedy and equitable adjustment of all complaints as close as possible to the point of origin. Whenever possible, grievances should be settled with supervisors in the department/division where the grievance originates. It is the intention of the District and the Union to eliminate unnecessary grievances, and to promptly and equitably adjust all those grievances which are meritorious.

22.2. Definitions.

22.2.1 Grievance

22.2.1.1. A grievance is any dispute between the District and an employee or group of employees concerning the interpretation or applications of this Memorandum; or the interpretation or application of rules or regulations governing personnel practices or working conditions; or the practical consequences of a District Rights decision on wages, hours and other terms and conditions of employment.

22.5. Procedural Steps.

22.5.1. Step 1. Informal Discussion/Filing of Grievance Statement

- 22.5.1.1. The employee who has a grievance other than discrimination [as described in (b) below] may, with or without the assistance of a representative, discuss the matter informally with his/her immediate supervisor. If the grievance is not settled through informal discussion and the employee desires further review, a completed and written Form PE-105, "Statement of Grievance", must be submitted to the employee's immediate supervisor within twelve (12) workdays from the initial date he/she knew, or reasonably could know, of the act or omission causing the grievance.

...

Position of the Union

In its post-hearing brief, the Union notes that it is standard practice for the District to deny grievances that are untimely and force the Union to proceed to arbitration if they wish to contest this determination. In this case, however, the District initially rejected the grievance due to timeliness, but nonetheless responded to the merits of the grievance and allowed the matter to go to a Board of Adjustment hearing without objection. The Union thus contends that the District accepted the griev-

ance despite concerns that it was untimely. It would make no sense to hold a Board of Adjustment if the District were rejecting the grievance for a procedural reason. Proceeding to the Board of Adjustment led the Union to believe that timeliness was no longer an issue. Moreover, notes the Union, the District did not raise the timeliness issue at the Board of Adjustment meeting.

The Union contends that when the Grievant was hired it was understood that he would be promoted to journeyman at the earliest opportunity. Yet, after 14 years and scoring highly on at least four occasions, the Grievant has consistently been passed over for promotion. This is despite his clean work record and pursuit of numerous training courses. Failure to promote the Grievant is attributed to his past activism with the Union, which is prohibited by the collective bargaining agreement. Because the Grievant successfully represented individuals that management wanted to terminate, he became disliked by management and as a result was blacklisted from advancement.

While the Union acknowledges that the Grievant ranked third going into the final interview, he is said to be the most qualified candidate for the position. Supporting this conclusion is the Grievant's experience with the District and that he had satisfactorily performed the duties of Automotive Mechanic B on a temporary basis in the past. He could fill the position without an adjustment period, and his supervisor admitted that he was qualified for the job.

The oral interview is characterized as superficial, and in any event the Grievant was nervous and unable to perform to the best of his ability. Although his su-

pervisor indicated that the Grievant's poor attendance record was a factor in passing him over, the Union notes that the supervisor was no longer concerned that sick leave was excessive.

Position of the District

In its post-hearing brief, the District emphasizes that Section 22.5.1.1 of the negotiated agreement requires that a grievance be submitted within 12 workdays from knowledge of the action causing the grievance. The Grievant was first made aware of his non-selection on March 10, yet he waited until April 12 before filing the grievance. This was 24 workdays after notification.

There is said to be no legal authority for the Union's contention that because timeliness was not specifically raised at the Board of Adjustment hearing the District is barred from pursuing the timeliness defense in arbitration. Also, Altarine Vernon, a District Senior Human Resources Analyst, testified that there is nothing in the agreement nor any understanding between the Parties that supports the Union's position. Therefore, the grievance should be denied because it was not timely filed.

The District notes the test scores on the written and performance exams, and that the Grievant came out tied for fourth place. He made the final oral interview only because he was the sole in-house candidate. Fleet Management, the Grievant's supervisors, had little or nothing to do with the examination process prior to the oral interview. Moreover, in the independently scored oral interview the Grievant was last by a considerable margin.

There were no earlier situations in which the Grievant was passed over for

selection in favor of a candidate with lower test scores. He is said to have acknowledged that this was the case. Also, he never filed grievances protesting any of his earlier denials of promotion.

The District contends that it did not discriminate against the Grievant based on his Union membership. Here, the Grievant's contact was limited to processing grievances with a single management official, District Manager John Bertorello, and he had no involvement in the promotion process. Further, the Grievant described their interactions as "civil," and was unaware of any desire on Mr. Bertorello's part to prevent his advancement.

On the performance test, the District notes that Supervisor Evans gave the Grievant 100 percent, the highest possible score. On the oral examination, one interviewer was a member of the Union and another was from outside the District.

Opinion and Decision

There was no stipulation of issues to be decided, but it is clear that there are two: (1) Was the grievance timely filed? And (2) Did the District properly deny the promotion to the Grievant, and if not, what shall the remedy be?

The first issue is a threshold question which, if answered affirmatively, allows the grievance to be considered on the merits. There is evidence supporting both views. Perhaps the strongest point is that the Grievant knew of the District's action to deny him the promotion on March 10 but did not file the grievance until April 12 (Jt. Exh. 2 and Tr., p. 109). Because the agreement allows only

12 workdays to file, the grievance is untimely. Even if constructive knowledge is assumed to be March 22, the date that Victor Zurich was actually hired, the grievance is still late.

In addition, Supervisor Evans indicated in the District's initial response to the grievance that it was denied on timeliness grounds (Jt. Exh. 2, Tr., p. 111). This was confirmed on cross-examination by the Union's chief steward, Ronald Barker (Tr., p. 29). While acknowledging this, Mr. Barker nonetheless contends that there was a past practice of waiving timeliness issues, that timeliness was not raised at the Board of Adjustment meeting, and that the District at that meeting proceeded strictly on the merits of the case (Tr., p. 25). Ms. Vernon, however, denies that timeliness was waived and indicates that there is nothing in the collective bargaining agreement or any other understanding that timeliness is waived if it is not specifically addressed at the Board of Adjustment (Tr., pp. 163-164).

The District apparently did not raise the timeliness issue at the Board of Adjustment (Tr., pp. 168-169), and one might suppose that by not doing so it was focusing on the merits and leaving the timeliness issue aside, at least for the time being. Richard Mellor, the Union's second vice-president, testified that his impression of the meeting was that the Union was trying to find out why the Grievant wasn't selected for the position (Tr., p. 54). It seems appropriate that the District would seek to provide this information, and unfair that by doing so it would somehow waive its earlier stated position of denial on timeliness grounds.

It is concluded that the grievance was not timely filed. But lest it appear that denial of the grievance is based solely on technical grounds, it should be noted that there is no merit to the Union's claim either.

One can empathize with the Grievant's situation. He was qualified as a journeyman when he was hired nearly 15 years ago. Although there is no documentation to support the idea that he was told he would be promoted at the earliest opportunity, one can identify with his statement that he expected to be advanced within a reasonable amount of time (Tr., p. 144). Supervisor Evans agrees that the Grievant is qualified to perform the job of Automotive Mechanic B (Tr., p. 86). Indeed, he has done the job in apparently satisfactory fashion at times in the past. The Grievant's sick leave usage has been excessive in the past, however, and remains a current problem (Tr., p. 131).

The Grievant's diligent and competent approach to training and development is admirable. The Union's exhibits contain extensive information about courses he has taken at the General Motors Training Center and at in-house training programs. His performance appears to be exemplary, usually at or above the national average.

The problem is that District policy and Civil Service rules require competition for promotion. As one of the leading public utilities in the nation, jobs in the District are prized in the labor market. The Grievant has been competitive in promotional situations but not enough so. He could provide no evidence from earlier promotion denials that lesser qualified candidates were chosen. In any

event, these denials were not grieved. There is no evidence that the circumstances leading to this grievance reflected unfairly on him. Although he claims he is the only long-term employee in his work group to have been denied promotion, there is another long-term employee, Rik Sheline, who has also been denied (Tr., pp. 150-151, 160-161).

The argument of discrimination for engaging in union activities is interesting but not convincing. It is true that the Grievant has been active in Union affairs, representing employees who have been disciplined. But there is no evidence of any animus or retaliation against him for his role as a Union representative, from Mr. Bertorello or anyone else (Tr., pp. 143-144). Supervisor Evans himself was actively involved in Union affairs before being promoted to management, and the individual who was hired, Mr. Zarich, was active as a union representative with his former employer (Tr., pp. 85, 108). Evans gave the Grievant a perfect score on the portion of the performance test that he graded (Tr., p. 99).

On the oral examination, care was taken to have independent assessment rather than joint determinations. One of the interviewers was a fellow Union member and the other was from outside the District. Each evaluator reached the same conclusion: that the Grievant was third among the interviewees.

There is simply no evidence that the Grievant was the victim of discrimination based on union activity nor other inequitable treatment. Thus it cannot be concluded that the decision to deny him the promotion was improper.

Award

After careful consideration of all written and oral evidence presented by the Parties, it is determined that grievance was not timely filed and that there was no impropriety in denying the Grievant the promotion to Automotive Mechanic B.

Accordingly, the grievance is denied.

Paul D. Staudohar
Arbitrator

April 14, 2000